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I. COURT DENIES COUNTIES OPPORTUNITY TO CONTEST REASONABLENESS OF INDIGENT CAPITAL DEFENDANT'S INVESTIGATIVE AND EXPERT FEES

In *Ex parte Lexington County*[1] the South Carolina Supreme Court held that a county does not have standing to participate in statutory ex parte hearings to determine the reasonableness of investigative and expert services required for representation of indigent capital murder defendants.[2] Because counties currently have potentially unlimited financial liability to provide attorneys' fees and expert costs in such cases, this decision has the potential to generate interest among concerned citizens and local officials throughout the state.[3] In order to fully understand the significance of this decision, it is necessary to first examine the legislative history of South Carolina Code section 16-3-26[4] and a related case, *Bailey v. State*.[5]

Prior to 1977, under the predecessor of current section 16-3-26, attorneys representing indigent defendants in capital murder cases were limited to $750 in fees plus necessary expenses approved by a trial judge.[6] In 1977 the South Carolina General Assembly increased the limit on attorneys' fees to $1,500 and established a $2,000 limit on investigative and expert services.[7] It also required that requests for investigative and expert services be presented ex parte.[8] Although the General Assembly did not specify which governmental entity was to pay for investigative and expert funds, it did specify that attorneys' fees were to be paid by "[t]he county in which the indictment was

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1. ___ S.C. ___, 442 S.E.2d 589 (1994).

2. *Id.* at ___, 442 S.E.2d at 594.

3. This potential unlimited liability is significant. In one instance, county council members were so concerned with payment of defense costs for an indigent defendant charged with killing a police officer that they threatened to sue the solicitor if he continued to seek the death penalty. One Jasper County attorney was quoted as saying, "We could be picking between killing [the defendant] and killing innocent people by not having an adequately funded hospital." Lisa Greene, *Death Penalty Becoming a Dollars-And-Cents Issue, Jasper County Can't Afford Possible Trial Costs*, THE STATE (Columbia, S.C.), Feb. 9, 1993 at 1B.

4. S.C. CODE ANN. § 16-3-26 (Law. Co-op. 1976 & Supp. 1994) (proscribing procedures for and setting limitations on an indigent capital defendant's requests for attorneys' fees and investigative and expert costs).

5. 309 S.C. 485, 424 S.E.2d 503 (1992).

6. Act of June 17, 1969, No. 309, §§ 4, 7, 1969 S.C. Acts 374, 375-77 (current version at S.C. CODE ANN. § 16-3-26 (Law. Co-op. Supp. 1994)).

7. Act of June 8, 1977, No. 177, § 3(B)-(C), 1977 S.C. Acts 407, 411-12 (current version at S.C. CODE ANN. § 16-3-26 (Law. Co-op. Supp. 1994)).

8. Act of June 8, 1977, No. 177, § 3(C), 1977 S.C. Acts 407, 412.

returned."[9] The statute's silence as to the source of investigative and expert services funding, coupled with its specification that the county pay attorneys' fees, implied that the state was to pay for investigative and expert costs. Considering only the express statutory language, a reasonable conclusion was that the state would pay up to $2,000 of investigative and expert costs for every indigent capital defendant and that counties would pay only for attorneys' fees up to the $1,500 limit.

Although not referenced in the statute, the 1977 Annual Appropriations Act contained a fixed appropriation of state funds for the defense of indigents.[10] These funds were allocated to the counties, according to population, until exhausted.[11] To address the limitation on state funds, the Appropriations Act further provided that "it is the intent of the General Assembly that any expense incurred in any county for the defense of indigents in excess of the county's share of funds appropriated . . . shall be borne by the county."[12] Accordingly, a reading of this provision of the appropriations bill, coupled with the existence of the $2,000 limit established by the statute, suggested that expert costs were limited to $2,000 regardless of whether the state or a county was to pay.

The statute was amended in 1978 to specify that both investigative and expert costs and attorneys fees would be paid from state "funds appropriated for the defense of indigents."[13] Unlike the 1977 version, the amended statute clearly referenced the state appropriation for the defense of indigents contained in the 1978 Annual Appropriations Act.[14] Like its predecessor,[15] the 1978 Annual Appropriations Act stipulated that a county would be liable if state funds for that county were exhausted.[16] Given the existence of a clear statutory reference to the Appropriations Act, it appeared more certain that there was a limit to what an individual indigent defendant could receive in the way of defense costs, regardless of whether the state or a county was the source of the funds.

In *Bailey v. State*,[17] however, the South Carolina Supreme Court concluded that section 16-3-26 only limited state liability and provided no protection to the counties. In so interpreting the statute, the court created virtually unlimited potential county exposure for indigent capital defense expenses. The issue before the court was the constitutionality of the statutory

9. Act of June 8, 1977, No. 177, § 3(B), 1977 S.C. Acts 407, 411-12.
10. 1977 Annual Appropriations Act, No. 219, Part I, § 4, 1977 S.C. Acts 564, 582-83.
11. 1977 Annual Appropriations Act, No. 219, Part I, § 4, 1977 S.C. Acts 564, 583.
12. 1977 Annual Appropriations Act, No. 219, Part I, § 4, 1977 S.C. Acts 564, 583.
13. Act of June 30, 1978, No. 555, § 2, 1978 S.C. Acts 1636, 1636-37.
14. 1978 Annual Appropriations Act, No. 644, Part I, § 4, 1978 S.C. Acts 1872, 1896.
15. *See supra* text accompanying notes 10-12.
16. 1978 Annual Appropriations Act, No. 644, Part I, § 4, 1978 S.C. Acts 1872, 1898.
17. ___ S.C. ___, 424 S.E.2d 503 (1992).

limit on attorneys' fees, which by 1992 had been increased to $5,000.[18] Finding $5,000 insufficient to guarantee indigent capital defendants the quality of legal representation mandated by the United States Supreme Court, the court stated that the statutory limit did "not provide compensation adequate to ensure effective assistance of counsel in capital cases."[19] Noting that legislative acts are presumptively constitutional, the court refused to strike any limit as unconstitutional, but rather upheld the statute as a limitation on state funds only.[20] The court then noted that the counties would be required "to supplement as required in a given case."[21] *Bailey* thereby set the stage for three cases of tremendous importance to Lexington County, South Carolina.

In January 1993 Lexington County was ordered to pay more than $65,000 in fees and expenses incurred in the defense of an indigent capital defendant.[22] Shortly thereafter, Lexington County learned that two capital indigent defendants, Johnny O'Landis Bennett and Raymond Patterson, Jr., had filed ex parte motions requesting funds for investigative and expert services.[23] Concerned with its potential exposure, Lexington County contended that it was entitled to participate in the ex parte proceeding and contest the reasonableness and necessity of expenses for which it would be liable.

At the ex parte hearings, Lexington County argued that section 16-3-26(C)'s ex parte hearing requirement did not apply to applications for county funds.[24] Counsel for Bennett and Patterson protested that Lexington County's participation was a violation of section 16-3-26(C), which requires an ex parte hearing for defendants to prove that requested investigative and expert services "are reasonably necessary for the representation of the defendant."[25] The defendants maintained that if the proof of reasonable necessity was offered in the presence of others, elements of their defense strategy would necessarily be revealed and the defense compromised. Defense counsel argued that county

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18. The Omnibus Criminal Justice Improvements Act of 1986, No. 462, § 26, 1986 S.C. Acts 2955, 2982-83.

19. *Bailey*, 309 S.C. at 464, 424 S.E.2d at 508.

20. *Id.*

21. *Id.* (citing McMehan v. York County Council, 281 S.C. 249, 315 S.E.2d 127 (Ct. App. 1984)); *see also* Hardaway v. County of Lexington, ___ S.C. ___, ___, 443 S.E.2d 569, 571 (1994) (acknowledging that the court "created by judicial decision in *Bailey* a new liability for counties where none formerly existed").

22. *Hardaway*, ___ S.C. at ___, 443 S.E.2d at 570; *see also* Lisa Greene, *Lexington Co. To Pay $65,000 In Death-penalty Defense Fees*, THE STATE (Columbia, S.C.), Jan. 21, 1993, at 1B. The supreme court later held that Lexington County was not liable for the expenses because they had been incurred prior to the *Bailey* decision. *Hardaway*, ___ S.C. at ___, 443 S.E.2d at 571 (limiting *Bailey* to prospective application).

23. *Ex parte* Lexington County, ___ S.C. at ___, 442 S.E.2d at 591.

24. Record at 57.

25. *See Ex parte* Lexington County, ___ S.C. at ___, 442 S.E.2d at 591-92; S.C. CODE ANN. § 16-3-26(C) (Law. Co-op. 1976 & Supp. 1994).

participation could result in leaks to the prosecution, jeopardizing the defendant's constitutional privilege against self-incrimination and right to counsel.[26]

Relying on *Bailey*, the trial court held that the county had a right to contest the reasonableness and the necessity of any expenses for which it would be liable. In an effort to comply with *Bailey,* make necessary funds available to the defendants, and still respect the county's desire to be heard, the trial judge offered to issue orders on the defendants' requests for funds outside the county's presence, but noted that such orders would only become effective as to the county after a hearing in which the county could be heard.[27] The defendants declined this offer, citing a need for the money prior to trial. Recognizing the novelty of the issue presented, the trial court certified its ruling for appeal. The South Carolina Supreme Court consolidated both cases for appeal.[28]

The supreme court declined to consider whether a constitutional right to an ex parte proceeding exists,[29] but rather approached the issue as one of statutory interpretation. Section 16-3-26(C) provides that the hearing should be held ex parte. Noting that an ex parte proceeding is one for the benefit of only one party,[30] the court held that only the defendant could participate in the ex parte proceeding mandated by the statute and that it would be error to allow Lexington County to participate.[31] This decision overlooked the inconsistency of applying section 16-3-26's ex parte requirement to counties while denying counties the protection of section 16-3-26's statutory limits.

Ex parte Lexington County also establishes that all ex parte proceedings on requests for investigative and expert services will likely be held in camera. While noting that there is a presumption in favor of open hearings and that the burden is on the defendant to show cause for closing a hearing, the court recognized that equal protection considerations[32] left "no reasonable alternatives to closure of the *ex parte* hearing which would protect these defendants' rights to a fair trial."[33]

Because the court found no statutory basis for protection of the counties financial interests in *Bailey* and denied counties the opportunity to protect themselves on a case-by-case basis in *Ex parte Lexington County*, the counties

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26. *Ex parte* Lexington County, ___ S.C. at ___, 442 S.E.2d at 591-93.
27. *Id.* at ___, 442 S.E.2d at 592.
28. *Id.* at ___, 442 S.E.2d at 591.
29. *Id.* at ___, 442 S.E.2d at 592.
30. *Id.* at ___, 442 S.E.2d at 593 (quoting BLACK'S LAW DICTIONARY 297 (5th ed. 1983)).
31. *Ex parte* Lexington County, ___ S.C. at ___, 442 S.E.2d at 593.
32. *Id.* at ___, 442 S.E.2d at 594 ("[D]efendants would have to reveal their defenses only because they are indigent. Any time criminal procedures discriminate against defendants by reason of their indigent status, such procedures violate the guarantee of equal protection.").
33. *Id.* at ___, 442 S.E.2d at 594.

continue to find themselves in an unenviable financial position. Since *Bailey* the General Assembly has allocated increasing amounts of state revenue to cover defense costs for indigent capital defendants. In 1993 the General Assembly appropriated $1,675,000 for the exclusive use of defendants in capital cases pursuant to section 16-3-26.[34] The limit on attorneys' fees was increased to $25,000,[35] and an added provision allowed the fee limit and the $2,500 limit on investigative and expert services to be exceeded if certified by a trial court.[36] A temporary amendment in 1994 increased the state appropriation to $2,750,000 and raised the limit on expert costs to $20,000.[37] Despite these increases in state funding, counties remain exposed after all allocated state funds are exhausted.

One potential source of relief could be found in the creation by the General Assembly of a statutory basis for counties to challenge the reasonableness and necessity of the requested expert services. Such a statutory solution would not increase the state's financial burden. Although this approach has equal protection implications,[38] procedural mechanisms for providing counties an opportunity to be heard while protecting a defendant's strategy from premature disclosure to the solicitor could be included in the statutory provisions.[39] Unless and until the South Carolina General Assembly acts,

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34. 1993 Annual Appropriations Act, No. 164, §14.1, 1994 S.C. Acts 531, 619.

35. S.C. CODE ANN. § 16-3-26(B) (Law. Co-op. 1976 & Supp. 1994).

36. S.C. CODE ANN. § 16-3-26(D) (Law. Co-op. Supp. 1994). This judicial certification provision may operate to further burden the counties. *See* Twila Decker, *Attorney Wants Judge to Declare Smith Indigent*, THE STATE (Columbia, S.C.), Feb. 15, 1995 at 1B (quoting University of South Carolina School of Law Professor Eldon Wedlock as saying, "If a defense attorney says [investigative and expert services are] needed and a judge says [they are] not, that could mean a reversal. . . . For that reason, judges err on the side of caution and approve [them].").

37. 1994 Annual Appropriations Act, No. 497, Part IB, § 14.1, 1994 S.C. Acts 5129, 5495, 5497.

38. *See Ex parte* Lexington County, ___ S.C. at ___, 442 S.E.2d at 594. Indigent capital defendants might also assert a constitutional right to an ex parte hearing based upon *Ake v. Oklahoma*, 470 U.S. 68 (1985). Several state courts have limited the scope and impact of *Ake*, either by directing the use of ex parte hearings only in limited circumstances, or by narrowly defining ex parte. *See, e.g.*, Brooks v. State, 385 S.E.2d 81, 83 (Ga. 1989) (finding that *Ake* did not clearly mandate an ex parte hearing and directing that the state, because of its financial interest, be allowed to submit a brief when an ex parte hearing is held), *cert. denied*, 494 U.S. 1018 (1990); State v. Ballard, 428 S.E.2d 178, 180 (N.C.) (finding that an ex parte hearing is constitutionally required for requests for psychiatric assistance because of the personal nature of the request), *cert. denied*, 114 S. Ct. 487 (1993); State v. Phipps, 418 S.E.2d 178, 190 (N.C. 1992) (stating that although an ex parte hearing "may in fact be the better practice, it is not always constitutionally required under Ake").

39. Particularly troublesome in this regard would be the Freedom of Information Act (FOIA). Under the FOIA, anything reported to a county would be subject to a FOIA request, providing a conduit for potential disclosure of defense trial strategy and thus undermining a defendant's right to effective assistance of counsel. *See Ex parte* Lexington County, ___ S.C. at ___ n.5, 442

counties will continue to have potentially unlimited liability for indigent capital defense expenses, with no opportunity to contest the reasonableness and necessity of the investigative and expert expenses to which they are exposed.

Mason A. Goldsmith, Jr.

II. COURT EXAMINES DEFENSE OF INSANITY AND GUILTY BUT MENTALLY ILL VERDICT

In *State v. Rimert*[1] the South Carolina Supreme Court addressed the affirmative defense of insanity in a murder trial. The court came to several conclusions. First, while the presumption of sanity does not itself create a jury issue, once the defense of insanity is raised the State need only present sufficient evidence of rational thought that cannot be explained by the circumstances for the issue of sanity to be decided by the jury.[2] Second, courts are not required to instruct a jury about the effects of choosing different verdicts because such instructions would not aid a jury whose task is limited to determining whether the defendant has committed the crime.[3] Third, the court interpreted South Carolina Code section 17-24-30[4] as requiring a judge to give a jury a choice between the following verdicts when the defendant has raised the issue of insanity: (1) guilty, (2) not guilty, (3) not guilty by reason of insanity, or (4) guilty but mentally ill.[5] Lastly, the court found that a defendant could not waive submission of a guilty but mentally ill verdict to a jury.[6]

Rimert was indicted for the murder of his grandparents and two of their neighbors. He asserted the affirmative defense of insanity. Trial testimony showed that Rimert, a diagnosed paranoid schizophrenic, left his medication at home and traveled south from Indiana[7] under the paranoid delusion that an old girlfriend had been kidnapped and taken to Florida.[8] When he arrived in South Carolina, Rimert went to his grandparents' home in Rock Hill and

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S.E.2d at 593 n.5.

1. ___ S.C. ___, 446 S.E.2d 400 (1994), *cert. denied*, 115 S. Ct. 730 (1995).
2. *Id.* at ___, 446 S.E.2d at 401.
3. *Id.* at ___, 446 S.E.2d at 401.
4. S.C. CODE ANN. § 17-24-30 (Law. Co-op. Supp. 1994).
5. *Rimert*, ___ S.C. at ___, 446 S.E.2d at 402 (citing State v. Wilson, 306 S.C. 498, 413 S.E.2d 19, *cert. denied*, 113 S. Ct. 137 (1992)).
6. *Id.* at ___, 446 S.E.2d at 402.
7. *Id.* at ___, 446 S.E.2d at 400-01.
8. Record at 90.

stabbed his grandparents to death, then walked next door and did the same to two neighbors.[9]

Rimert presented experts who testified that he was under the influence of paranoid delusions and was incapable of distinguishing between right and wrong when he committed the acts.[10] The State offered no rebutting experts, but offered lay testimony that Rimert had cleaned the knife, acted as if he had done something wrong, and asked a policeman how he could "get out of this."[11]

Rimert moved for a directed verdict, alleging that the preponderance of evidence showed beyond a reasonable doubt that he was insane. The trial judge denied the motion and sent the issue to the jury. The trial judge permitted the jury to choose from all four options provided by section 17-24-30[12] and did not instruct the jury as to the possible effects of each verdict on Rimert's sentence.[13] The jury returned a verdict of guilty but mentally ill.[14] On appeal, the supreme court affirmed and found that the trial court correctly allowed the jury to decide the issue of sanity.[15]

In South Carolina, an accused is presumed to be sane, relieving the State from having to prove sanity in every case. However, once the accused presents evidence that suggests insanity, "the presumption [of sanity] disappears and it is incumbent on the State to present evidence from which a jury could find the defendant sane."[16] The State may present this evidence through either lay testimony or expert testimony, regardless of whether the accused produces experts.[17] Based upon these principles of law, the *Rimert* court concluded that

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9. *Rimert*, ___ S.C. at ___, 446 S.E.2d at 400.

10. Record at 131-90.

11. *Rimert*, ___ S.C. at ___, 446 S.E.2d at 401.

12. S.C. CODE ANN. § 17-24-30 (Law. Co-op. Supp. 1994). The four options are: guilty, not guilty, not guilty by reason of insanity, or guilty but mentally ill. *Id.*

13. *Rimert*, ___ S.C. at ___, 446 S.E.2d at 401.

14. *Id.* at ___, 446 S.E.2d at 400.

15. *Id.* at ___, 446 S.E.2d at 401.

16. State v. Milian-Hernandez, 289 S.C. 183, 186, 336 S.E.2d 476, 477 (1988).

17. *See* State v. Smith, 298 S.C. 205, 208-09, 379 S.E.2d 287, 288-89 (1989) (holding lay testimony sufficient to prove a defendant sane even if the defendant presents expert testimony). The *Rimert* court never took issue with whether lay testimony is sufficient to rebut expert testimony on the issue of sanity, but because the State provided no experts and survived the directed verdict motions, the sufficiency of such testimony is implicit in the court's holding. South Carolina courts give greater deference to juries in this situation than many other jurisdictions. For example, the Alabama Court of Criminal Appeals held that while "a factfinder need not adhere to expert opinion on incompetency if there is reason to discount it . . . the jury cannot arbitrarily ignore the experts in favor of observations of laymen." Ellis v. State, 570 So. 2d 744 (Ala. Crim. App. 1990) (quoting Strickland v. Francis, 738 F.2d 1542, 1552 (11th Cir. 1984)). In addition, the Alabama court stated that the jury "must have an 'objective reason,' to disregard the expert's opinion which is rebutted only by lay testimony." *Id.* at 752 (citing Wallace v. Kemp, 757 F.2d 1102, 1109 (11th Cir. 1985)).

the evidence of sanity offered by the State could not be easily explained by the surrounding circumstances and, therefore, Rimert's sanity was a factual issue to be decided by the jury.[18]

The *Rimert* court's decision is consistent with South Carolina precedent. *State v. Milian-Hernandez*[19] is the leading case in South Carolina regarding burdens of proof in insanity defense cases. In *Milian-Hernandez* the State provided testimony that would normally be evidence of rational thought, but because it could be explained by the surrounding circumstances, it was insufficient to survive a directed verdict. Specifically, the State offered two pieces of evidence to rebut the testimony of insanity offered by the accused: (1) the presumption that a defendant is sane, and (2) the fact that the accused fled the scene. The court first noted that the presumption of sanity disappears once the accused offers evidence of insanity. The court then held that while flight is normally evidence of rational thought, the paranoid delusions of pursuit surrounding the accused's actions were "such as to negate that permissible inference" normally associated with flight. Hence, although the state provided testimony of rational thought, because it could be explained by the surrounding circumstances, it was insufficient to survive a motion for directed verdict.[20]

In *Rimert* the defendant also argued that the evidence of sanity offered by the State could be explained by the defendant's delusional state. Rimert's experts testified that his cooperative and calm demeanor was typical of a person suffering from paranoid delusions. In addition, Rimert argued that his remarks to the police regarding how to "get out of this" were reflective of his inability to grasp reality.[21] The court was not persuaded and found that the evidence was not clearly explainable by the circumstances.[22]

The essential difference between the evidence offered in *Rimert*, as compared to that offered in *Hernandez*, is that the actions of the accused in *Hernandez* were consistent with the nature of the paranoid delusion, whereas the evidence offered in *Rimert* was too unrelated to the delusion to be explained away. The essence of Rimert's argument was that a sane person would not ask the police how to get out of a quadruple murder, wash off the murder weapon and wait for the police to arrive, or calmly sit in a chair while still wearing blood stained clothes. Because, however, the actions observed by the officers upon arriving at the murder scene were not what one would expect of a person under a paranoid delusion that he needed to rush to Florida, the *Rimert* court was able to distinguish its case from *Hernandez*.

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18. *Rimert*, ___ S.C. at ___, 446 S.E.2d at 401.
19. 287 S.C. 183, 336 S.E.2d 476 (1985).
20. *Id.* at 186, 336 S.E.2d at 477.
21. Record at 174, 220.
22. *See Rimert*, ___ S.C. at ___, 446 S.E.2d at 401.

Next, the *Rimert* court held that the trial court did not err in refusing to instruct the jury on the effects of the different verdicts the jury could return.[23] The basis of Rimert's objection was his belief that the prosecuting attorney misled the jury into believing that the "guilty but mentally ill" verdict would impose a lighter sentence on Rimert than a strictly guilty sentence. The court determined that an explanation of the consequences of each verdict does not aid the jury in their function, which is to determine only whether the defendant committed the offense. The court also held that the trial court's curative instruction explaining this point to the jury was sufficient to remove any prejudice.[24] This determination is consistent with previous South Carolina law[25] and that of numerous other jurisdictions.[26]

Unlike South Carolina, some states require that the jury knows the consequences of a verdict. In Louisiana, for example, an instruction explaining the consequences of a verdict must be given if requested by the defendant or the jurors.[27] The request must be in writing before the instructions are given and the court must determine that not giving the instruction would result in "a miscarriage of justice, prejudice to the substantial rights of the accused, or a substantial violation of a constitutional or statutory right."[28] In *State v. Shickles*[29] the Supreme Court of Utah considered the precise issue presented in *Rimert*. The *Shickles* court noted that a jury ordinarily does not need to know the consequences of a guilty verdict because juries usually are limited to returning a verdict of either guilty or innocent. However, the court stated that the case before it was different:

> The jury was not given an either/or decision; it had to choose one of four verdicts. To make an intelligent, rational choice, the jury needed an explanation of those verdicts that were not self-evident. Specifically, the jury needed to know the consequences of the guilty and mentally ill verdict and the not guilty by reason of insanity verdict, since they have a less than obvious meaning and effect. To fulfill the legislative purpose in providing these two types of verdicts, juries must know the effect the verdicts will have. . . . Clearly, "guilty" and "not guilty" verdict forms require no

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23. *Id.* at ___, 446 S.E.2d at 401.

24. *Id.* at ___, 446 S.E.2d at 401 (citing State v. Huiett, 271 S.C. 205, 246 S.E.2d 862 (1978)).

25. *See* State v. Poindexter, ___ S.C. ___, ___, 431 S.E.2d 254, 255 (1993); State v. McGee, 268 S.C. 618, 235 S.E.2d 715 (1977).

26. *See, e.g.*, Cooper v. State, 325 S.E.2d 137, 139-40 (Ga. 1985); People v. Ramsey, 375 N.W.2d 297, 304-05 (Mich. 1985).

27. *See* State v. Leeming, 612 So. 2d 308, 315 (La. Ct. App. 1992), *cert. denied*, 616 So. 2d 681 (La. 1993).

28. *Id.* (citing State v. Pettaway, 450 So. 2d 1345 (La. Ct. App.), *cert. denied*, 456 So. 2d 171 (La. 1984)).

29. 760 P.2d 291 (Utah 1988).

> special explanations to the jury. . . . [A] verdict of guilty and mentally ill is new to our law, and its effect and meaning are not self-evident.[30]

The South Carolina Supreme Court also determined in *Rimert* that it was not improper to give the jury the option of choosing between guilty and guilty but mentally ill verdicts. The court construed section 17-24-30 as requiring a judge to give the jury the option between guilty, not guilty, not guilty by reason of insanity, and guilty but mentally ill any time evidence of insanity is presented.[31] Such an interpretation may be a strained reading of the statute.[32] In the statute, the word "must" modifies "verdict." Therefore, "must" arguably does not require the trial judge to provide all of the options to the jury, but mandates only that the final verdict be one of the listed four. Furthermore, a trial judge arguably should be permitted to exclude an option if there is insufficient evidence to support that specific verdict.

The supreme court put to rest Rimert's argument that since the guilty and the guilty but mentally ill verdict carried the same sentence, Rimert, as the defendant, had the option to waive the guilty but mentally ill verdict from being charged to the jury. By interpreting section 17-24-30 as requiring a court to submit all four possible verdicts to the jury, the court quickly concluded that Rimert could not waive the verdict.[33]

The importance of *Rimert* lies in its clarification of the burden of production required by the State in a murder trial where the defendant raises an insanity defense. In order for evidence to be explainable by the circumstances, it must have a sufficient nexus to and specifically coincide with the paranoid delusions suffered by the accused. However, to say that the evidence is inconsistent with other evidence that tends to show insanity is not sufficient. Finally, the court interpreted section 17-24-30 as requiring that courts offer a

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30. *Id.* at 296-97. For a thorough discussion on the various approaches taken by jurisdictions to deal with this problem, see *id.* at 296-301.

31. *Rimert*, ___ S.C. at ___, 446 S.E.2d at 402.

32. Section 17-24-30 provides:

> In a prosecution for a crime when the affirmative defense of insanity is raised sufficiently by the defendant, . . . the trier of fact shall find under the applicable law, and the verdict must so state, whether the defendant is:
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> (1) guilty;
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> (2) not guilty;
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> (3) not guilty by reason of insanity; or
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> (4) guilty but mentally ill.

S.C. CODE ANN. § 17-24-30 (Law. Co-op. Supp. 1994).

33. *Rimert*, ___ S.C. at ___, 446 S.E.2d at 402. In support of this proposition, the court relied upon People v. Ritsema, 307 N.W.2d 380 (Mich. Ct. App. 1981), where the Michigan Court of Appeals stated "where the evidence supports an instruction on the defense of insanity, the instruction on guilty but mentally ill must also be given. The duty imposed upon the trial judge by the legislature cannot be waived by the defendant." *Ritsema*, 307 N.W.2d at 385.

jury confronted with the issue of insanity four verdict options, including the guilty but mentally ill verdict.

Michael M. Shetterly

III. COURT TAKES STEPS TO CONTROL POTENTIAL PROSECUTORIAL ABUSE OF STATE GRAND JURY

In *State v. Thrift*[1] the South Carolina Supreme Court held that plea agreements must appear on the record,[2] denied the state authorization to compel testimony by granting "use" immunity,[3] and declared that polygraph evidence is not admissible before South Carolina grand juries.[4] The court also found that the 1991 Ethics Act[5] did not entirely repeal previous ethics provisions.[6]

Sam, Tom, Glenn, and Gary Thrift were the principals of Thrift Brothers, Inc., an Upstate road-paving business qualified to bid with the State Highway Department. In 1991 the South Carolina Attorney General's office assumed a discontinued federal investigation of the Thrifts, focusing on allegations that the Thrifts had given illegal gifts and bribes to highway department officials.[7] Although the violations occurred primarily in the Upstate, the Attorney General believed that the Thrifts' influence in Greenville County would hinder an attempt to secure convictions there. Consequently, the Attorney General's office restricted its indictment to charges that could be prosecuted in Horry county.[8]

The grand jury indicted Sam Thrift, Tom Thrift, and Herman P. Snyder, the Chief Highway Engineer, for multiple violations of state law.[9] The parties reached a plea agreement under which all three plead guilty to general criminal conspiracy. On December 11, 1991, the Attorney General's office notified the Highway Department in writing that the plea agreement "complet-

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1. ___ S.C. ___, 440 S.E.2d 341 (1994).

2. *Id.* at ___, 440 S.E.2d at 348.

3. *Id.* at ___, 440 S.E.2d at 351. *But see* S.C. CODE ANN. § 14-7-1760 (Law. Co-op. Supp. 1994).

4. *Thrift*, ___ S.C. at ___, 440 S.E.2d at 352.

5. 1991 S.C. Acts 248 (codified as amended in Title 8, Chapter 13, of the South Carolina Code).

6. *Thrift*, ___ S.C. at ___, 440 S.E.2d at 353-55.

7. *Id.* at ___, 440 S.E.2d at 344.

8. The court expressed concern over the General Attorney's decision, stating that such acts of discretion could "set a different prosecutorial standard for the powerful or influential, which tends to undermine the very foundation of justice." *Id.* at ___ n.1, 440 S.E.2d at 344 n.1.

9. *Id.* at ___, 440 S.E.2d at 344-45.

ed its prosecution of Sam Thrift, Tom Thrift, and Herman Snyder."[10] The letter specified that the Attorney General's office did not "plan to seek prosecution of any additional individuals."[11] As part of the plea agreement, the Thrifts entered into a debarment agreement with the Highway Department in which they agreed to "assist the Highway Department in any internal investigations against Highway Department officials for misconduct on violation of rules and regulations."[12]

On May 4, 1992, the amended State Grand Jury Act[13] expanded the jurisdiction of the State Grand Jury to include crimes involving public corruption.[14] As a result, then Attorney General Medlock reopened the Thrift investigation despite the Horry County plea agreement. In July 1992 the Attorney General's office presented findings of the Thrift investigation to the State Grand Jury, spawning several new indictments.[15]

The proceeding, however, contained irregularities. For example, Sam, Tom, and Gary Thrift, as well as Rogers Carroll, a Highway Department official, had testified before the grand jury under grants of immunity.[16] The same grand jury later indicted each of these witnesses despite the grant of immunity.[17]

In addition, John David Gilreath, Sr., a Highway Department official, testified that he had refused to take a polygraph test. The Chief Deputy Attorney General then called the polygraph operator to testify. The operator stated that he advised people not to take the polygraph "if they are going to have to lie about something."[18] The same grand jury which heard this testimony indicted Gilreath.[19] On January 22, 1993, the circuit court judge issued a pretrial order dismissing all indictments on various grounds;[20] the State appealed.[21]

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10. *Id.* at ___, 440 S.E.2d at 345.
11. *Thrift*, ___ S.C. at ___, 440 S.E.2d at 345.
12. *Id.* at ___, 440 S.E.2d at 345.
13. S.C. CODE ANN. §§ 14-7-1600 to -1820 (Law. Co-op. Supp. 1994).
14. The expanded jurisdiction includes:

> [A]ny crime, statutory, common law or other, involving public corruption as defined in Section 14-7-1615, any crime, statutory, common law or other, arising out of or in connection with a crime involving public corruption as defined in Section 14-7-1615, and any attempt, aiding, abetting, solicitation, or conspiracy to commit any crime, statutory, common law or other, involving public corruption . . . .

S.C. CODE ANN. § 14-7-1630(A)(2) (Law. Co-op. Supp. 1994).
15. *Thrift*, ___ S.C. at ___, 440 S.E.2d at 345.
16. *Id.* at ___, 440 S.E.2d at 349.
17. *Id.* at ___, 440 S.E.2d at 350.
18. *Id.* at ___, 440 S.E.2d at 352.
19. *Id.* at ___, 440 S.E.2d at 345.
20. *Thrift*, ___ S.C. at ___, 440 S.E.2d at 345.
21. *Id.* at ___, 440 S.E.2d at 346.

Before considering the merits of the appeal, the South Carolina Supreme Court disposed of two preliminary issues. First, the court defined the scope of review applicable to pretrial rulings, stating that "'[a]ppellate courts are bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law.'"[22] Second, the court acknowledged the constraints on judicial review of prosecutorial actions; this constraint results from the separation of powers, which vests the executive branch with discretion when exercising the prosecutorial function. Prosecutors may "decide when and where to present an indictment, and may even decide whether an indictment should be sought."[23] Moreover, prosecutors have the power to plea bargain or to choose not to prosecute.[24] The court noted that "the South Carolina Constitution and South Carolina case law place the unfettered discretion to prosecute solely in the prosecutor's hands."[25] The judicial branch may not infringe on this prosecutorial discretion, but may "review and interpret" the results of its exercise.[26] Justice Toal, writing for the majority, conceded this limitation on the judicial branch by writing, "[w]hether the plea agreement is wise, or even in the best interests of the state, is not the question before us."[27] The court then turned to the merits.

The court affirmed the circuit court judge's dismissal of the indictments against the Thrifts. Although the parties had not reduced the plea agreement to writing, the court held that oral plea agreements are "perfectly enforceable."[28] Consequently, the court found that the plea agreement prevented further prosecution of the Thrifts and their corporations.[29]

The court relied on three established rules governing plea agreements. First, a promise or agreement made by the State that results in a guilty plea must be enforced.[30] Second, the actions of one district attorney encumber the

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22. *Id.* at ___, 440 S.E.2d at 346 (quoting State v. Amerson, ___ S.C. ___, ___, 428 S.E.2d 871, 873 (1993)).

23. *Id.* at ___, 440 S.E.2d at 346.

24. *Id.* at ___, 440 S.E.2d at 347.

25. *Thrift*, ___ S.C. at ___, 440 S.E.2d at 346 (citing S.C. CONST. art. V, § 24 and State *ex rel.* McLeod v. Snipes, 266 S.C. 415, 223 S.E.2d 853 (1976)).

26. *Id.* at ___, 440 S.E.2d at 347.

27. *Id.* at ___, 440 S.E.2d at 347.

28. *Id.* at ___, 440 S.E.2d at 348.

29. *Id.* at ___, 440 S.E.2d at 348-49.

30. *Thrift*, ___ S.C. at ___, 440 S.E.2d at 347 (citing Santobello v. New York, 404 U.S. 257 (1971) (holding that when a prosecutor's promise or agreement is the significant inducement for a guilty plea, the agreement must be sustained); United States v. Ringling, 988 F.2d 504 (4th Cir. 1993) (stating that contractual principles undergird plea bargains, and parties to such an agreement should receive the benefit of the bargain); Baughman v. State, ___ S.C. ___, 430 S.E.2d 505 (1993) (holding that plea agreements are to be enforced, and that the court may not imply a term upon which the parties did not agree); and State v. Gates, 299 S.C. 92, 382 S.E.2d

actions of all other district attorneys.[31] Finally, the government bears the responsibility for ambiguities in the agreement.[32] Accordingly, the court concluded that the terms of the Horry County plea agreement bound all prosecuting authorities in the state, including the Attorney General.[33]

The court next considered the scope of the agreement. This inquiry, like the construction of an ambiguous contract, is a question of law.[34] The Assistant Attorney General's December 1991 letter to the Highway Department named only Sam Thrift, Tom Thrift, and Herman Snyder as released from subsequent prosecution. Nonetheless, the court upheld the trial judge's finding that the underlying plea agreement "prohibited the State from further prosecution of the *Thrifts* or *their corporations* for conspiracy or substantive acts of bribery of Highway Department officials."[35]

Justice Toal reprimanded the State for failing to clarify the plea agreement:

> On the present facts, the State's current dilemma is one of its own creation. The State had the opportunity to set forth the scope of the agreement and persons to whom the agreement applied, but did not. We caution both the bench and bar that this can no longer be an option.[36]

To prevent ambiguity in future agreements, the court held prospectively that all plea agreements must appear on the record and must state the scope, offenses, and individuals involved in the agreement. The court specifically limited appellate review of plea agreements "to those terms which are fully set forth in the record."[37]

The court's concern for the integrity of the plea bargaining process is commendable for two reasons. First, resolving criminal charges without a trial is invaluable to the judicial system.[38] The United States Supreme Court has stated:

> [Plea bargaining] leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial;

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886 (1989) (sustaining a plea agreement which proved to be unfavorable to the prosecution)).

31. *Id.* at ___, 440 S.E.2d at 347 (citing *Ringling*, 988 F.2d at 507).

32. *Id.* at ___, 440 S.E.2d at 347 (citing *Ringling*, 988 F.2d 504).

33. *Id.* at ___, 440 S.E.2d at 347-48.

34. *Id.* at ___, 440 S.E.2d at 347 (citing Baughman v. State, ___ S.C. ___, 430 S.E.2d 505 (1993); State v. Gates, 299 S.C. 92, 382 S.E.2d 886 (1989)).

35. *Thrift*, ___ S.C. at ___, 440 S.E.2d at 346 (emphasis added).

36. *Id.* at ___, 440 S.E.2d at 347.

37. *Id.* at ___, 440 S.E.2d at 348.

38. *See* Santobello v. New York, 404 U.S. 257, 261 (1971).

> it protects the public from those accused persons who are prone to continue criminal conduct even while on pre-trial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.[39]

Second, negotiation and performance of a plea agreement implicate constitutional concerns.[40] A defendant who enters a guilty plea waives the rights to remain silent, to be tried by a jury, to confront one's accusers, to call witnesses, and to be convicted by proof beyond reasonable doubt.[41] The Supreme Court has declared each of these rights to be "fundamental."[42] Therefore, while plea bargaining is an indispensable aid to the judicial process, courts must also protect the rights of the defendant.

The Thrifts and Rogers Carroll asserted that the amended State Grand Jury Act violated the South Carolina Constitution because the Act allowed the State to compel testimony upon a grant of mere "use" immunity rather than the broader "transactional" immunity.[43] "Transactional immunity . . . shields the witness from *any prosecution* for the transaction or offense to which his compelled testimony relates."[44] Use immunity, on the other hand, "prohibits the witness' compelled testimony and its fruits from being *used in any manner* in connection with the criminal prosecution of the witness."[45] The original State Grand Jury Act granted transactional immunity for testimony compelled after a claim of Fifth Amendment privilege.[46] The 1992 amendments reduced the required grant of immunity to "use" and "derivative use" immunity.[47]

The court held that the South Carolina Constitution requires that the prosecution grant transactional immunity before compelling testimony.[48]

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39. *Id.* (citing Brady v. United States, 397 U.S. 742, 751-52 (1970)).

40. *Id.* at 264 (Douglas, J., concurring); United States v. Ringling, 988 F.2d 504, 506 (4th Cir. 1993); United States v. Harvey, 791 F.2d 294, 300 (4th Cir. 1986); *Thrift*, ___ S.C. at ___, 440 S.E.2d at 347.

41. *Santobello*, 404 U.S. at 264 (Douglas, J., concurring) (citations omitted).

42. *Id.*

43. *Thrift*, ___ S.C. at ___, 440 S.E.2d at 349-50.

44. *Id.* at ___, 440 S.E.2d at 349 (citing Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964)).

45. *Id.* at ___, 440 S.E.2d at 349 (citing Kastigar v. United States, 406 U.S. 441 (1972)).

46. *Id.* at ___, 440 S.E.2d at 351.

47. "[N]o [compelled] testimony . . . or other information [so] produced, or any information directly or indirectly derived from such testimony or such other information, may be received against him in any criminal action, criminal investigation, or criminal proceeding." S.C. CODE ANN. § 14-7-1760 (Law. Co-op. Supp. 1994).

48. *Thrift*, ___ S.C. at ___, 440 S.E.2d at 351.

While the court recognized *Kastigar v. United States*[49] as the controlling case interpreting the federal Constitution, the court refused to limit the South Carolina Constitution by accepting the *Kastigar* analysis.[50] In *Kastigar*, the United States Supreme Court upheld the constitutionality of a federal statute authorizing the government to compel testimony by granting use and derivative use immunity.[51] The *Kastigar* court, however, constructed a procedural safeguard by requiring the government to prove that the evidence used to procure the indictment is "wholly independent" of the compelled testimony and its fruits.[52] Despite the availability of this safeguard, the *Thrift* court held that the South Carolina Constitution demands broader protection for compelled testimony.[53] The court reasoned that, despite the procedural safeguards, the *Kastigar* rule did not curtail "[t]he potential for Double Jeopardy problems in prosecutions of use immunized witnesses and the constitutional implications of indictments by the same grand jury which heard use immunized testimony. . . ."[54]

In so holding, the court relied upon an older, "controlling" South Carolina decision,[55] decided on "strikingly similar facts."[56] In *Ex Parte Johnson* the court had held that anything less than transactional immunity violated the South Carolina Constitution.[57] At the time that *Ex parte Johnson* was decided, however, the applicable federal decision was *Counselman v. Hitchcock*.[58] In *Counselman*, the United States Supreme Court held that the minimum constitutionally guaranteed immunity was transactional immunity.[59] In *Ex parte Johnson* the court conceded that the Federal Constitution was not involved.[60] The federal privilege against self-incrimination was, however, "identical with the clause on that subject contained in our present State

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49. 406 U.S. 441 (1972).

50. *Thrift*, ___ S.C. at ___, 440 S.E.2d at 350.

51. *Kastigar*, 406 U.S. at 453.

52. *Id.* at 460. The resulting procedure has been named the "Kastigar hearing." *See, e.g.*, United States v. Harris, 973 F.2d 333, 336 (4th Cir. 1992). The government ordinarily bears the burden of proof, by a preponderance of the evidence, that proffered evidence was derived from independent sources. United States v. North, 910 F.2d 843, 854 (D.C. Cir.), *modified in part*, 920 F.2d 940 (1990) (per curiam), *cert. denied*, 111 S. Ct. 2235 (1991).

53. *Thrift*, ___ S.C. at ___, 440 S.E.2d at 351; *see* Dickerson v. Coca-Cola Bottling Co., ___ S.C. ___, 440 S.E.2d 359, 361-62 (1994) (holding that any grant of immunity less than transactional immunity is unconstitutional) (following *Thrift*, ___ S.C. ___, 440 S.E.2d 341).

54. *Thrift*, ___ S.C. at ___, 440 S.E.2d at 350.

55. *Ex parte* Johnson, 187 S.C. 1, 196 S.E. 164 (1938).

56. *Thrift*, ___ S.C. at ___, 440 S.E.2d at 350.

57. *Ex parte* Johnson, 187 S.C. at 12-13, 196 S.E. at 169.

58. 142 U.S. 547 (1892).

59. *Id.* at 585.

60. The Fifth Amendment privilege against self-incrimination was not made applicable to the states until almost thirty years after *Ex parte Johnson*. Malloy v. Hogan, 378 U.S. 1, 6 (1964).

Constitution."[61] Therefore, relying on the United States Supreme Court's construction of an identical provision, the South Carolina Supreme Court determined that the privilege against self-incrimination under the South Carolina Constitution was coextensive with the federal protection.

In 1972, however, the United States Supreme Court in *Kastigar* explained that the statute in *Counselman* had run afoul of the Fifth Amendment not by failing to grant transactional immunity, but by authorizing the compulsion of testimony upon a grant of mere use immunity.[62] The Court had found use immunity inadequate because it failed to prevent the use of evidence "derived from [the] compelled testimony."[63] Therefore, a statute authorizing the prosecution to compel testimony by granting both use and derivative use immunity is constitutionally permissible.[64] Use and derivative use immunity is "[i]mmunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom. . . ."[65] This protection "prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness."[66]

After *Kastigar*, the South Carolina Supreme Court again confronted an effort to compel testimony against a claim of privilege.[67] In *Reeves* the court disagreed with the statement that "the S[outh] C[arolina] [privilege against self-incrimination] provides greater protection than the comparable section of the U[nited] S[tates] Constitution."[68] While *Reeves* did not involve the testimony of an immunized witness,[69] this statement seemed to imply that South Carolina would be guided by the Supreme Court's *Kastigar* decision. Nonetheless, the *Thrift* court distinguished *Reeves* and held that the South Carolina Constitution does afford more protection than the federal Constitution.[70] The amended State Grand Jury Act therefore offended the South Carolina Constitution by allowing the State to compel testimony without granting transactional immunity.

The *Thrift* holding is somewhat surprising because South Carolina courts ordinarily will not decide a constitutional issue unless the constitutional issue

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61. *Ex parte* Johnson, 187 S.C. at 8, 196 S.E. at 167.

62. Kastigar v. United States, 406 U.S. 441, 449-51 (1972).

63. *Id.* at 453-54.

64. *Id.* at 453.

65. *Id.*

66. *Id.*

67. South Carolina Tax Comm'n v. Reeves, 278 S.C. 658, 300 S.E.2d 916 (1983).

68. *Id.* at 660, 300 S.E.2d at 917.

69. *Reeves* involved an attempt by an individual partner to invoke the Fifth Amendment privilege against self-incrimination on behalf of a partnership. *Id.* at 659, 300 S.E.2d at 916.

70. *Thrift*, ___ S.C. at ___, 440 S.E.2d at 351.

is necessary to resolve the case.[71] The *Thrift* court seemingly could have resolved the case without invalidating the amended State Grand Jury Act.

First, the same State Grand Jury heard the immunized testimony and indicted the immunized witnesses.[72] In this situation, other courts have imposed a more stringent burden of proof on the government in a Kastigar hearing.[73] The Second Circuit Court of Appeals has taken a different approach, adopting a *per se* rule which prevents a grand jury from hearing immunized testimony and subsequently indicting the immunized witness.[74] The Second Circuit Court of Appeals adhered to the *Kastigar* rule in allowing the government to compel testimony by granting use and derivative use immunity. Nonetheless, the court ruled that allowing the same grand jury to hear the immunized testimony and indict the immunized witness precludes a finding that the evidentiary source of the indictment was "wholly independent" of the immunized testimony.[75] In the *Thrift* case, the court acknowledged, but did not adopt, the *Hinton* rule[76] which would have rendered the constitutional question moot.

Second, the South Carolina Supreme Court could have relied on the *Kastigar* rule itself to dismiss the indictments. The compulsion of testimony requires adequate procedural safeguards, and the current federal safeguard is the *Kastigar* hearing. In this hearing, the government bears the burden of proving that the evidentiary source of the indictment was "wholly independent" of the compelled testimony.[77] The *Thrift* court could have considered whether the *Kastigar* burden had been satisfied. If not, the indictments would have violated the federal Constitution, thus eliminating the need to examine the South Carolina Constitution.

The court's failure to employ these escape routes and the opinion's emphatic language[78] suggest that the court was seeking to curb the power of

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71. *See, e.g.*, Thorne v. Seabrook, 264 S.C. 503, 216 S.E.2d 177 (1975); Hampton v. Dodson, 240 S.C. 532, 126 S.E.2d 564 (1962); Heyward v. South Carolina Tax Comm'n, 240 S.C. 347, 126 S.E.2d 15 (1962).

72. *Thrift*, ___ S.C. at ___, 440 S.E.2d at 351.

73. *See, e.g.*, United States v. Garrett, 797 F.2d 656, 662-64 (8th Cir. 1986); United States v. Zielezinski, 740 F.2d 727, 734 (9th Cir. 1984).

74. Unites States v. Hinton, 543 F.2d 1002 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976), 430 U.S. 982 (1977). The Second Circuit Court of Appeals premised this rule on the view that "where the indictment is returned by the same grand jury which heard the defendant's immunized testimony, it would be virtually impossible for the Government to show that it had an independent source" for the indictment. *Id.* at 1007.

75. *Id.* at 1008-09.

76. *Thrift*, ___ S.C. at ___ n.10, 440 S.E.2d at 350-51 n.10.

77. Kastigar v. United States, 406 U.S. 441, 460 (1972).

78. "[T]he rule in *Ex parte Johnson* is sound and quite necessary to protect the tenets of the South Carolina Constitution. Where the government compels a witness to incriminate himself, then by constitutional necessity, the government must do so at its own peril." *Thrift*, ___ S.C.

the State Grand Jury. Despite the availability of less drastic remedies to the prosecutorial conduct in *Thrift*, the court chose to fashion a rule designed to prevent reoccurrence of perceived abuses of prosecutorial power.

The court next struck down Gilreath's indictment, holding that the evidence about polygraphing was both inadmissible and prejudicial. The court stated that, while evidence about polygraphing is clearly inadmissible at trial,[79] the admissibility of such evidence before a South Carolina grand jury was a novel issue.[80] A grand jury proceeding is less formal than a trial, and the procedural and evidentiary safeguards available to a defendant at trial may not be available in a grand jury proceeding.[81] The United States Supreme Court has limited the constitutional protections afforded to the target of a grand jury investigation.[82] Therefore, despite the compelling arguments against admission of polygraph evidence at trial, there are convincing arguments for the admission of such evidence before the grand jury. State courts have split on this issue.[83]

In considering the remedy for the introduction of evidence about polygraphing, the court noted that, "[o]rdinarily, [courts] do not inquire into the nature or sufficiency of the evidence before a grand jury."[84] If, however, the defendant makes a colorable claim of prosecutorial misconduct, the court will inquire into the legitimacy of the indictment.[85] Where there is a colorable claim of prosecutorial misconduct, the court must determine (1) whether there was such misconduct, and, if so, (2) whether the misconduct so prejudiced the proceeding that the indictment should be dismissed.[86]

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at ___, 440 S.E.2d at 351.

79. *Id.* at ___, 440 S.E.2d at 352 (citing State v. Pressley, 290 S.C. 251, 349 S.E.2d 403 (1986)); *accord* State v. McGuire, 272 S.C. 547, 253 S.E.2d 103 (1979) (per curiam).

80. *Thrift*, ___ S.C. at ___, 440 S.E.2d at 352.

81. *See, e.g.*, United States v. Overmyer, 899 F.2d 457, 465 (6th Cir. 1990) (exercising "extreme caution in dismissing an indictment for alleged grand jury misconduct"); United States v. Kouba, 822 F.2d 768, 774 (8th Cir. 1987) (stating that "[t]he remedy for dismissal of an indictment due to grand jury abuse is appropriate only upon actual prejudice to the accused").

82. *See* United States v. Williams, 504 U.S. 36 (1992) (holding that the prosecution's failure to produce substantial exculpatory evidence in a grand jury proceeding does not necessitate dismissal of the indictment); United States v. Calandra, 414 U.S. 338 (1974) (holding that a witness before a grand jury may not refuse to answer questions on the ground that they result from evidence obtained in an illegal search and seizure); Costello v. United States, 350 U.S. 359 (1956) (holding that hearsay evidence is sufficient to support a grand jury indictment).

83. *Thrift*, ___ S.C. at ___, 440 S.E.2d at 352. *Compare* State v. Woodson, 551 A.2d 1187 (R.I. 1988); People v. Frank, 422 N.Y.S.2d 317 (Sup. Ct. 1979) *with In re* Grand Jury Investigation, 791 F. Supp. 192 (S.D. Ohio 1992).

84. *Thrift*, ___ S.C. at ___, 440 S.E.2d at 352 (citing State v. Williams, 301 S.C. 369, 392 S.E.2d 181 (1990) (per curiam) and State v. Williams, 263 S.C. 290, 210 S.E.2d 298 (1974)).

85. *Id.* at ___, 440 S.E.2d at 352.

86. *Id.* at ___, 440 S.E.2d at 352-53.

The court first addressed the issue of prosecutorial misconduct. In South Carolina, such a claim is difficult to establish.[87] In *Thrift*, the trial court found that the prosecution had behaved improperly. The supreme court, however, reversed this finding.[88] The court justified the reversal by observing that the admissibility of evidence about polygraphing before the grand jury was a novel issue.[89] In the words of Justice Toal, "the Attorney General and the Attorney General's staff handled the Thrift matter in complete good faith and in accord with the highest of ethical and professional standards."[90]

Despite the absence of demonstrated prosecutorial misconduct, the court addressed the possibility that the prosecution's conduct prejudiced the proceeding. Dismissing an indictment for non-constitutional error is appropriate only if the evidence "substantially influenced" the grand jury, or if "there is grave doubt that the decision to indict was free from substantial influence of such violations."[91] Applying this standard, the court found that the introduction of evidence about polygraphing severely prejudiced the proceeding and justified dismissal.[92]

As with its reaction to the immunity issue, the court adopted an extreme remedy for a moderate violation. First, the procedural and evidentiary safeguards at trial are not necessarily available in grand jury proceedings.[93] Second, dismissal of an indictment for a violation of non-constitutional proportions is a relatively drastic remedy.[94] Once again, the court seems to have been primarily focused on the potential abuse of the power of the State Grand Jury.

The court next addressed the third major issue before it, holding that Article 7 of the Ethics, Government Accountability, and Campaign Reform Act of 1991[95] did not impliedly repeal the "old" Ethics Act.[96] Although it listed several applicable rules of statutory construction, the court rested its conclusion on the rule that "legislative intent must prevail if it can be

87. *Id.* at ___, 440 S.E.2d at 352.

88. *Id.* at ___, 440 S.E.2d at 353.

89. *Thrift*, ___ S.C. at ___, 440 S.E.2d at 353.

90. *Id.* at ___, 440 S.E.2d at 353.

91. *Id.* at ___, 440 S.E.2d at 353 (citing Bank of Nova Scotia v. United States, 487 U.S. 250 (1988)).

92. *Id.* at ___, 440 S.E.2d at 353.

93. *See supra* notes 79-83 and accompanying text.

94. The "harmless error rule" prohibits dismissal of an indictment unless the proceedings were substantially prejudiced by the non-constitutional violation. *See, e.g.*, Bank of Nova Scotia v. United States, 487 U.S. 250 (1988); United States v. Mechanik, 475 U.S. 66 (1986).

95. 1991 S.C. Acts 248 (codified as amended in Title 8, Chapter 13, of the South Carolina Code).

96. S.C. CODE ANN. § 8-13-490 (Law. Co-op. 1976).

reasonably discovered in the language used as it is construed in the light of the intended purpose."[97] The court found that because the new Ethics Act unambiguously states that the legislative intent was to amend, not to repeal, the old Ethics Act,[98] the old Ethics Act remains viable law.[99]

Finally, the court held that the indicted Highway Department officials were "public officials" subject to prosecution for misconduct in office.[100] A public official is "one who is charged with exercising some sovereign power in the performance of his duties"[101] or one with a duty to the public.[102] The court found that the duties of the indicted Highway Department officials were of great concern to the public[103] and, accordingly, held that Highway Department officials were subject to prosecution for misconduct in office.

The signal sent by the court in *Thrift* is clear: "A grand jury is not a prosecutor's plaything, and the awesome power of the State should not be abused but should be used deliberately, not in haste."[104] As the court noted in its opinion, "[t]he grand jury is more than a mere instrument of the prosecution."[105] An unwillingness to ignore possible violations of prosecutorial authority, particularly before an increasingly powerful State Grand Jury, obviously animated the *Thrift* court. In an effort to control potential abuse of the State Grand Jury, the court held that the prosecution must respect plea agreements, and that such plea agreements must appear on the record; that the prosecution must grant transactional immunity in order to compel testimony from recalcitrant witnesses; and that polygraph evidence is inadmissible before South Carolina grand juries. These holdings will close potential avenues for prosecutorial abuse of the State Grand Jury.

B. Eric Shytle

IV. *MENS REA* OF KNOWLEDGE REQUIRED UNDER KIDNAPPING STATUTE

In *State v. Jefferies*[1] the South Carolina Supreme Court sought to determine what, if any, *mens rea*, or required mental state, is necessary under

97. *Thrift*, ___ S.C. at ___, 440 S.E.2d at 354.
98. *Id.* at ___, 440 S.E.2d at 354.
99. *Id.* at ___, 440 S.E.2d at 355.
100. *Id.* at ___, 440 S.E.2d at 356.
101. *Id.* at ___, 440 S.E.2d at 356 (citing Sanders v. Belue, 78 S.C. 171, 58 S.E. 762 (1907)).
102. *Thrift*, ___ S.C. at ___, 440 S.E.2d at 356.
103. *Id.* at ___, 440 S.E.2d at 356.
104. State v. Capps, 276 S.C. 59, 61, 275 S.E.2d 872, 873 (1981).
105. *Thrift*, ___ S.C. at ___ n.15, 440 S.E.2d at 353 n.15.

1. ___ S.C. ___, 446 S.E.2d 427 (1994), *cert. denied*, 115 S. Ct. 911 (1995).

the South Carolina kidnapping statute.[2] The court held that, although the statute makes no explicit mention of a *mens rea* requirement, the legislature intended to require a mental state of at least "knowledge" for kidnapping in South Carolina.[3]

On November 25, 1988, the defendant (Jefferies) escaped from a youth detention center in Richland County and looked for an automobile to aid his escape. At the same time, Ronald Caldwell (Caldwell) left his car with the motor running, and with his four-month old son inside, in the parking lot of a convenience store while he went to get change to use a pay telephone. As Jefferies got in the car and began to pull out of the parking lot, Caldwell ran to the moving car, held onto the window, and pleaded for the release of his son. Jefferies admitted that he looked around the car and noticed the infant as Caldwell was pleading for his son's release. Nevertheless, Jefferies picked up speed and headed toward the interstate until Caldwell eventually let go of the car. Later that night, when Jefferies was apprehended, he told the police he left the infant next to a garbage dumpster more than twenty miles from where he stole the car.[4]

At his trial, Jefferies claimed he was not guilty of kidnapping because he did not possess the requisite intent to kidnap.[5] The trial judge charged the jury with the South Carolina kidnapping statute and the additional element of a "positive act."[6] The jury found Jefferies guilty. Jefferies appealed the trial judge's failure to define a "positive act" and failure to charge intent as an element of kidnapping.[7] His appeal ultimately reached the United States Supreme Court.[8] The Supreme Court remanded the case to the court of appeals, which granted Jefferies a new trial.[9] The South Carolina Supreme Court reversed the court of appeals and upheld the conviction, holding that Jefferies possessed the requisite *mens rea* of knowledge.[10]

At the time this case came to trial, the South Carolina kidnapping statute provided:

> Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority

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2. S.C. CODE ANN. § 16-3-910 (Law. Co-op. 1985) (amended 1991).

3. *Jefferies*, ___ S.C. at ___, 446 S.E.2d at 430-31.

4. *Id.* at ___, 446 S.E.2d at 428.

5. *Id.* at ___, 446 S.E.2d at 429.

6. *Id.* at ___, 446 S.E.2d at 429.

7. *See* State v. Jefferies, 304 S.C. 141, 403 S.E.2d 169 (Ct. App. 1991) (upholding the trial court's ruling).

8. *See* Jefferies v. South Carolina, 112 S. Ct. 1464 (1992).

9. State v. Jefferies, 308 S.C. 414, 415, 418 S.E.2d 339, 340 (Ct. App. 1992), *rev'd*, ___ S.C. ___, 446 S.E.2d 427 (1994).

10. *Jefferies*, ___ S.C. at ___, ___, 446 S.E.2d at 429, 433.

> of law, except when a minor is seized or taken by a parent thereof, shall be guilty of a felony and, upon conviction, shall suffer the punishment of life imprisonment unless sentenced for murder as provided in § 16-3-20.[11]

The statute does not expressly state what, if any, *mens rea* is required to sustain a conviction for kidnapping. Therefore, the South Carolina Supreme Court looked to the history and development of the statute to determine if the legislature intended the crime to require a particular *mens rea* element, or if the legislature intended that kidnapping be a crime of strict liability.[12]

The *Jefferies* court began its analysis by examining the language of the original kidnapping statute.[13] The court reasoned that even though no *mens rea* was explicitly stated in the original statute, the use of the word "procure" implied taking possession of a minor "with some degree of effort or knowledge."[14] In 1937 the statute was amended to add the requirement of holding the person for ransom or reward.[15] The court reasoned that the addition of this element indicated legislative intent to increase the required mental state to one of "purpose."[16] However, the deletion of the reward or ransom requirement in 1976[17] revealed that the legislature clearly intended to lower the required culpable state of mind. Additionally, the court found no evidence of any legislative intent to make kidnapping a crime of strict liability.[18] Therefore, having found legislative intent to establish a lower *mens rea* requirement than purpose, but a higher requirement than strict liability, the court determined that the requisite *mens rea* for kidnapping in South Carolina is knowledge.[19] Having determined that a defendant must have knowledge

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11. S.C. CODE ANN. § 16-3-910 (Law. Co-op. 1985). This statute was amended in 1991 to decrease the maximum penalty to imprisonment for thirty years, unless the defendant is sentenced for murder. S.C. CODE ANN. § 16-3-910 (Law. Co-op. Supp. 1994).

12. *Jefferies*, ___ S.C. at ___, 446 S.E.2d at 430. A crime of strict liability is one that requires no element of intent or fault. State v. Ferguson, 302 S.C. 269, 272, 395 S.E.2d 182, 183 (1990).

13. The original statute provided:

> That if any person shall procure and carry without the limits of the State any minor or person under the age of twenty-one years, without the consent of the parents or guardian of such minor, such person shall, upon conviction thereof, be fined in a sum not less than one hundred, nor more than five hundred dollars, or be imprisoned in the Penitentiary of the State for a period of not less than one year.

1871 S.C. Acts 324 § 2.

14. *Jefferies*, ___ S.C. at ___ n.5, 446 S.E.2d at 430 n.5.

15. 1937 S.C. Acts 106.

16. *Jefferies*, ___ S.C. at ___, 446 S.E.2d at 430.

17. *See* 1976 S.C. Acts 684.

18. *Jefferies*, ___ S.C. at ___, 446 S.E.2d at 430.

19. *Id.* at ___, 446 S.E.2d at 430-31.

of the kidnapping, the court affirmed Jefferies' conviction based on his admission that he was aware of the infant's presence in the car and continued to drive away.[20]

In upholding the conviction, the court stated that "'[c]riminal liability is normally based upon the concurrence of two factors, "an evil meaning mind [and] an evil doing hand."'"[21] The court cited *United States v. Bailey*[22] for the proposition that "[t]he required *mens rea* for a particular crime can be classified into a hierarchy of culpable states of mind in descending order of culpability, as purpose, knowledge, recklessness, and negligence."[23] This approach follows the Model Penal Code, which rejects the common-law classification of crimes as requiring either general or specific intent.[24] The *Bailey* court expounded on the hierarchy by elaborating on the distinction between "purpose" and "knowledge." A person acts purposefully if "'he consciously desires that result, whatever the likelihood of that result happening from his conduct,' while he is said to act knowingly if he is aware 'that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.'"[25] The Court then stated that the distinction between purpose and knowledge is of little importance with most crimes because there is usually sufficient reason to find guilt when a person possesses the lesser culpable mental state of knowledge.[26] In making this distinction, the *Bailey* court recognized that there was only a narrow class of crimes that require the heightened culpability of purpose.[27]

South Carolina previously recognized this hierarchy of culpability in *State v. Ferguson*.[28] In that case, the defendant was charged with bribing a police officer and distributing cocaine. The supreme court considered whether the trial court properly charged the jury on the mental state required to be convicted of those crimes. The court recognized the hierarchy of culpable states of mind and then held that the determination of which mental state is applicable to a particular crime is a question of legislative intent.[29] Because

20. *Id.* at ___, 446 S.E.2d at 433.

21. *Id.* at ___, 446 S.E.2d at 430 (quoting United States v. Bailey, 444 U.S. 394, 402 (1980)).

22. 444 U.S. 394 (1980).

23. *Jefferies*, ___ S.C. at ___, 446 S.E.2d at 430.

24. *Id.* at ___, 446 S.E.2d at 430; *see also* WAYNE R. LAFAVE & AUSTIN N. SCOTT, JR., HANDBOOK ON CRIMINAL LAW § 28 (1972) (providing a detailed discussion of the distinction between intent/purpose and knowledge).

25. *Bailey*, 444 U.S. at 404 (quoting United States v. U.S. Gypsum Co., 438 U.S. 422, 422, 445 (1978) (quoting LAFAVE & SCOTT, *supra* note 24, § 28, at 196)).

26. *Id.* at 404 (quoting *United States Gypsum Co.*, 438 U.S. at 445 (quoting LAFAVE & SCOTT, *supra* note 24, § 28, at 197)).

27. *Id.* at 405. The Court listed murder, treason, and conspiracy as examples of crimes that require a mental state of purpose.

28. 302 S.C. 269, 271, 395 S.E.2d 182, 183 (1990).

29. *Id.* at 271-72, 395 S.E.2d at 183.

the statutes involved in *Ferguson* did not expressly indicate what, if any, mental state was required, the court sought to determine legislative intent through an analysis of the common law and through statutory interpretation.[30]

The court's method of determining the required *mens rea* for the elements of a particular criminal statute containing no express requirement is consistent with the analysis previously employed in *Ferguson*. As in *Ferguson*, the court determined legislative intent through statutory construction and a review of the statute's legislative history.[31] The *Jefferies* court then applied the definitions of purpose and knowledge from *Bailey* to the South Carolina kidnapping statute.[32]

Other jurisdictions have also employed similar methodology to determine the required *mens rea* for a particular crime when the statute is silent regarding state of mind. In *Wagerman v. Indiana*[33] the Indiana Court of Appeals followed an approach similar to the one used in *Jefferies* to determine the required *mens rea* for a statute dealing with the alteration of handgun identification marks.[34] In *Wagerman* the defendant was convicted for possession of a handgun with an altered serial number.[35] The Indiana statute had no express or implied *mens rea* requirement.[36] Both at trial and on appeal, Wagerman argued that the State was required to show that he knew the serial numbers had been altered.[37] The court of appeals held that when construing a criminal statute with no express *mens rea* requirement, "'criminal intent has generally been viewed as a presumptive element in criminal offenses.'"[38] The court then set forth a list of factors to determine whether criminal intent is an essential element of a given crime. The factors are:

1) the legislative history, title or context of a criminal statute;
2) similar or related statutes;

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30. *Id.* at 272, 395 S.E.2d at 183.
31. *Jefferies*, ___ S.C. at ___, 446 S.E.2d at 430-31.
32. *Id.* at ___, 446 S.E.2d at 431.
33. 597 N.E.2d 13 (Ind. Ct. App. 1992).
34. *Id.* at 15.
35. *Id.* at 14.
36. *See* IND. CODE ANN. § 35-47-2-18 (Burns 1994). The statute provides:

> No person shall:
> (1) Change, alter, remove, or obliterate the name of the maker, model, manufacturer's serial number, or other mark of identification on any handgun; or
> (2) Possess any handgun on which the name of the maker, model, manufacturer's serial number, or other mark of identification has been changed, altered, removed, or obliterated . . . .

Id. At trial, the defendant in *Wagerman* was convicted under subsection (2) of this statute. *See Wagerman*, 597 N.E.2d at 15.
37. *Wagerman*, 597 N.E.2d at 15.
38. *Id.* (quoting Indiana v. Keihn, 542 N.E.2d 963, 966 (Ind. 1989)).

3) the severity of punishment (greater penalties favor a culpable mental state requirement);
4) the danger to the public of prohibited conduct (greater danger reduces the need for a culpable mental state requirement);
5) the defendant's opportunity to ascertain the operative facts and avoid the prohibited conduct;
6) the prosecutor's difficulty in proving the defendant's mental state; and
7) the number of expected prosecutions (greater numbers suggest that a crime does not require a culpable mental state).[39]

The court held that it would presume a required mental state unless a review of the factors decisively indicated that the legislature did not intend to make criminal intent an essential element of the crime.[40]

The Supreme Court of New Mexico made a similar presumption in *Santillanes v. New Mexico*.[41] In *Santillanes* the court was confronted with defining the *mens rea* element in the state child abuse statute. The court stated:

> When a criminal statute is silent about whether a *mens rea* element is required, we do not assume that the legislature intended to enact a no-fault or strict liability crime. *Instead, it is well settled that we presume criminal intent as an essential element of the crime unless it is clear from the statute that the legislature intended to omit the mens rea element.*[42]

Applying this analysis, the court held that criminal negligence was the required *mens rea* under the New Mexico child abuse statute.[43]

Although the approaches applied in *Wagerman* and *Jefferies* are similar in that they both look to the intent of the legislature to determine if there is a required state of mind for a particular crime, there are nevertheless some subtle differences in how the two courts determine legislative intent. Indiana begins with a presumption that the legislature intended criminal intent to be an essential element of the crime, while South Carolina has not expressly held that there is such a presumption.[44] In addition, Indiana employs a seven-factor analysis to determine if the presumption of criminal intent can be

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39. *Id.* (quoting *Keihn*, 542 N.E.2d at 967 (citing 1 LAFAVE & SCOTT, SUBSTANTIVE CRIMINAL LAW, § 3.8, at 342-44 (1986))).
40. *Id.*
41. 849 P.2d 358, 361 (N.M. 1993).
42. *Id.* (emphasis added).
43. *Id.* at 365.
44. *See Jefferies*, ___ S.C. at ___, 446 S.E.2d at 430.

overcome.[45] South Carolina, on the other hand, uses only the traditional canons of statutory construction and legislative history to determine the intent of the legislature.[46]

Jefferies, in addition to establishing that a person charged with kidnapping must at least possess a mental state of knowledge in order to be found guilty, reiterated the methodology that courts in this state should employ to determine the required *mens rea* for elements of a particular crime when the statute is silent regarding mental state. Specifically, courts should use the traditional canons of statutory interpretation and examine legislative history to determine if the legislature intended the crime to require a particular mental state, or if the intent was to make the crime one of strict liability. Finally, *Jefferies* reaffirms that South Carolina has embraced the hierarchy of culpable states of mind contained in the Model Penal Code.

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45. *See Wagerman*, 597 N.E.2d at 15.
46. *See Jefferies*, ___ S.C. at ___, 446 S.E.2d at 430.